

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

2010 APR 14 F

Billy D. Littlejohn,) C/A No. 2:10-00843-RBH-RSC
Petitioner,)
vs.)
Warden M. M. Mitchell,) Report and Recommendation
Respondent.)
)

Under established local procedure in this judicial district, a careful review has been made of this *pro se* petition pursuant to the Rules Governing Section 2254 Proceedings for the United States District Court, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and other habeas corpus statutes. The review has been conducted in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995); and *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983).

This Court is required to liberally construe *pro se* documents. *Estelle v. Gamble*, 429 U.S. 97 (1976). Such *pro se* documents are held to a less stringent standard than those drafted by attorneys,

Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case. *Erickson v Pardus*, 551 U.S. 89 (2007); *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). Even under this less stringent standard, however, this *pro se* petition is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Serv.*, 901 F.2d 387 (4th Cir. 1990).

Background

Petitioner indicates that he was incarcerated for twenty-six (26) months and then placed on probation for a period of two years for an unspecified offense. (Pet. p. 5). Petitioner was subsequently locked up for a probation violation based on "improper charging of GPS bracelet and dirty urine." (Pet. p. 3). As a result of the probation violation, Petitioner's probation was revoked on April 18, 2006, and he was sentenced in the "D.C. Superior Court" to thirty (30) months of incarceration and three (3) years of supervised release. (Pet. p. 2). Petitioner, who claims that his probation was "unreasonably" revoked, seeks release and/or re-sentencing. (Pet. pp. 3, 4).

Discussion

Petitioner files the instant habeas petition pursuant to 28 U.S.C. § 2241 challenging the April 2006 revocation of Petitioner's probation or supervised release. Petitioner asserts that the sentencing judge failed to take various "mitigating factors" into account and failed to give Petitioner credit for twenty-six (26) months spent in custody. (Pet. pp. 3, 5). Thus, Petitioner alleges that his probation revocation sentence was unreasonable. Petitioner also alleges that he improperly received a "30 months sentence enhancement" and that his "custody points" are incorrect. (Pet. p. 4).

However, "[c]ourts have held that a prisoner challenging the revocation of supervised release must file his motion under § 2255." *Barnhardt v. Mitchell*, C.A. No. 0:09-1452-RBH, 2009 WL 2430662 at *4 n.5 (D.S.C. Aug. 6, 2009). See also *Milnes v. Samples*, No. 88-7584, 1988 WL 105445 at *3 (4th Cir. Sept. 22, 1988). Further, such a motion must be filed in the sentencing court. 28 U.S.C. § 2255. See also *Braden v. 30th Judicial Cir. Court of Kentucky*, 410 U.S. 484, 497 (1973). Therefore, the present habeas action under § 2241 is subject to summary dismissal.

Prior to enactment of 28 U.S.C. § 2255, the only way a federal prisoner could collaterally attack a federal conviction was through a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. See *Triestman v. United States*, 124 F.3d 361, 373 (2d Cir.

1997). In 1948, Congress enacted § 2255 primarily to serve as a more efficient and convenient substitute for the traditional habeas corpus remedy. *In re Dorsainvil*, 119 F.3d 245, 249 (3rd Cir. 1997). The enactment of § 2255 was also needed, "[b]ecause pertinent court records and witnesses were located in the sentencing district [and] it became impractical to require these petitions to be filed in the district of confinement." *Dumornay v. United States*, No. 93-1402, 1994 WL 170752, at *1 (10th Cir. May 5, 1994). Thus, "the remedy provided by 2255 was intended to be as broad as that provided by the habeas corpus remedy". *Id.*, citing *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Since relief granted pursuant to § 2255 "is as broad as that of habeas corpus 'it supplants habeas corpus, unless it is shown to be inadequate or ineffective to test the legality of the prisoner's detention'". *Id.* at *2, quoting *Williams v. United States*, 323 F.2d 672, 673 (10th Cir. 1963). See also *Waletzki v. Keohane*, 13 F.3d 1079, 1080, (7th Cir. 1994) ("a prisoner who challenges his federal conviction or sentence cannot use the federal habeas corpus statute at all but instead must proceed under 28 U.S.C. § 2255").

Although § 2255 expressly prohibits a prisoner from using § 2241 to challenge a conviction and sentence, § 2255 does contain a "savings clause." This "savings clause" allows a prisoner to challenge the validity of a conviction under § 2241, if the prisoner can demonstrate that § 2255 is "inadequate or ineffective

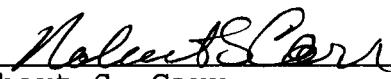
to test the legality of his detention." 28 U.S.C. § 2255 (e). The Fourth Circuit Court of Appeals, in *In re Jones*, 226 F.3d 328 (4th Cir. 2000), set forth the test to determine whether a §2255 motion should be considered inadequate or ineffective. In order to invoke the "savings clause," a petitioner must demonstrate that: "(1) at the time of the conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first §2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law." *Jones*, 226 F.3d at 333-334.

In the instant action, Petitioner does not contend that 28 U.S.C. 2255 is inadequate or ineffective to contest the legality of Petitioner's probation revocation sentence, and he presents no facts to indicate that he meets any of the aforementioned *Jones* criteria, required to invoke the "savings clause" of § 2255. Additionally, it is noted the "savings clause" has not been extended to prisoners who challenge only their sentences. *Brown v. Rivera*, No. 9:08-CV-3177-PMD-BM, 2009 WL 960212 at *3 (D.S.C. April 7, 2009). See also *United States v. Poole*, 531 F.3d 263, 267 (4th Cir. 2008). As Petitioner seeks to challenge a federal sentence, but fails to demonstrate that § 2255 is inadequate or ineffective

to test the legality of his detention, Petitioner's writ of habeas corpus filed pursuant to 28 U.S.C. § 2241, is subject to dismissal.

Recommendation

Accordingly, it is recommended that the petition for a writ of habeas corpus in the above-captioned case be dismissed *without prejudice* and without issuance and service of process upon the Respondent. See *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (federal district courts have duty to screen habeas corpus petitions and eliminate burden placed on respondents caused by ordering an unnecessary answer or return). Petitioner's attention is directed to the important notice on the next page.



Robert S. Carr
United States Magistrate Judge

April 13 , 2010
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).